

This Opinion Is Not a
Precedent of the TTAB

Mailed: August 5, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Pfanner Schutzbekleidung GmbH
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Application Serial No. 79247130
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Stewart J. Bellus of Collard and Roe for Pfanner Schutzbekleidung GmbH.

April Roach, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.
—

Before Zervas, Bergsman and Wolfson, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Pfanner Schutzbekleidung GmbH (Applicant) seeks registration on the Principal Register of the mark PFANNER STRETCHFLEX, in standard character form, for the following products:

Accident, radiation and fire protection garments; accident protection gloves; protective garments for forestry workers and forestry supervisors, namely clothing for protection against fire, gloves for protection against serious hand injury from the ingress of foreign objects, and protective work gloves offering a high-resistance to oils and nitrile on the palms; protective garments for working with saws, namely cut resistant gloves and clothing for accident prevention; hard hats; protective garments for work,

namely bullet proof vests, fireproof clothing; protective clothing for work in deep freeze environment, namely insulated clothing for protection against accidents; heat protective garments, namely clothing for protection against accidents; knee pads for workers; protective masks for workers; bullet proof and stab proof vests; protective masks; garments for the protection against traffic accidents; life vests; lifejackets; diving suits; working shoes specifically adapted for protection against accident or injury; work safety footwear, namely protective industrial footwear; protective helmets for sports, in International Class 9;

Shin, knee, back, and elbow protectors, namely athletic protective shin, knee, back and elbow pads for playing sports as sports equipment; fencing, golfing, boxing, water skiing, and baseball gloves, and other sporting gloves, namely hockey gloves, windsurfing gloves, and gloves offering best grip for ice and wetness for use in hockey; climbing belts, namely for mountaineering; protecting cushions for sports equipment, namely billiard table cushions, safety padding for volleyball and tennis uprights, in International Class 28.¹

Applicant claims ownership of Registration No. 4223679 for the mark PFANNER (stylized), reproduced below, for similar products in International Classes 9 and 28.²

PFANNER

The Examining Attorney refused to register Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark STRETCHFLEX, in standard character form, for the products we list below, as to be likely to cause confusion:

¹ Serial No. 79247130 was filed June 12, 2018 as a request for extension of protection of International Registration No. 1438360 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a). Applicant claims a priority date of June 12, 2018.

² Registration No. 4223678, registered October 16, 2012; Section 71 affidavit accepted.

Men's and boy's underwear; Men's and boy's loungewear, namely, pants, shorts, jersey tops, thermal tops, and sets comprised of the foregoing, all of the foregoing in knit or woven fabrics, in International Class 25.³

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant or for which there is evidence of record. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). “[E]ach case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

“Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. ... Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc'ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, *3 (Fed. Cir. 2020). In any likelihood of confusion analysis, two key

³ Registration No. 5360605 registered December 19, 2017.

considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

I. The strength of the registered mark, including the number and nature of similar marks in use in connection with similar goods.

When making a determination of likelihood of confusion in an ex parte appeal, in order to determine the conceptual strength of a cited word mark under the sixth *DuPont* factor, we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary-fanciful continuum of words. Word marks that are arbitrary, fanciful, or suggestive are “held to be inherently distinctive.” *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000). *See also In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1684 (Fed. Cir. 2010) (“In general, trademarks are assessed according to a scale formulated by Judge Friendly in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ 759 (2d Cir. 1976), which evaluates whether word marks are ‘arbitrary’ or ‘fanciful,’

‘suggestive,’ ‘descriptive,’ or ‘generic.’”). We also look to evidence pertaining to the number and nature of similar marks in use in connection with similar goods.⁴

At the outset, because Registrant’s mark is registered on the Principal Register for underwear and loungewear, we must presume that it is inherently distinctive, i.e., that it is at worst suggestive of those goods. 15 U.S.C. § 1057(b) (registration is “prima facie evidence of the validity of the registered mark”); *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (when mark is registered on the Principal Register, “we must assume that it is at least suggestive”).

MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines the word “stretch,” inter alia, as an adjective meaning “easily stretched: ELASTIC.”⁵ It defines “stretched,” inter alia, as “to extend in length” or “to become extended in length, or breadth or both: SPREAD.” *Id.*

MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines the word “flex,” inter alia, as “bend,” “flexibility,” or “pliancy.”⁶

The term STRETCHFLEX when used in connection with Registrant’s underwear and loungewear suggests that the clothing adjusts or conforms itself to the form or body of the person wearing it. The third-party registrations submitted by Applicant corroborates our interpretation of the term STRETCHFLEX albeit as applied to

⁴ Applicant did not submit any evidence of similar marks in use for similar goods.

⁵ Accessed July 29, 2021. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

⁶ Accessed July 29, 2021.

nonrelated goods. We reproduce below the three live registrations Applicant submitted:⁷

Mark	Reg. No.	Goods
STRETCHFLEX Registered under the provisions of 2(f) of the Trademark Act	5133264	Trash bags
STRETCHFLEX and design STRETCHFLEX	29202788 2236991	Plastic film for industrial or commercial wrapping, namely, stretch film for wrapping pallets

While STRETCHFLEX may be suggestive of a desirable characteristic of underwear and loungewear, STRETCHFLEX is not necessarily a weak term entitled to only a limited scope of protection. *See Husky Oil Co. of De. v. Huskie Freightways, Inc.*, 176 USPQ 351, 353 (TTAB 1972) (“While ‘HUSKY’ might be somewhat suggestive of strength, this factor does not necessarily make it a ‘weak’ mark entitled to a limited scope of protection.”). Based on the evidence in this record, the level of suggestiveness will not influence our analysis of the similarity or dissimilarity of the marks.

⁷ June 6, 2019 Office Action (TSDR 19-26). Applicant also submitted a copy of cancelled Registration No. 4435517 for the mark STRETCHFLEX for protective gloves. A cancelled registration is not evidence of anything except that it issued. *See Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 704.03(b)(1)(A) (2021).

Although the third-party registrations are not for similar underwear or loungewear-related products, as they corroborate the dictionary definitions of record, they provide some supporting evidence as to the commercial impression engendered by the term “Stretchflex.”

References to the prosecution history are to the USPTO Trademark Status and Document Retrieval system (TSDR) by page number in the downloadable .pdf format.

II. The similarity or dissimilarity of the marks.

We now turn to the *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). Because Registrant’s goods are underwear and loungewear, the average customer is an ordinary consumer who purchases men’s or boy’s underwear and loungewear. However, because Applicant’s description of goods comprise protective clothing (e.g., accident, radiation and fire protection garments) and protective sporting gear (e.g., athletic protective shin, knee,

back and elbow pads for playing sports), we presume that Applicant's intended consumers will exercise a heightened degree of consumer care based on the nature of the products.

Applicant is seeking to register the mark PFANNER STRETCHFLEX and the registered mark is STRETCHFLEX. The marks are similar because they both include the term "Stretchflex," but differ because Applicant has added the name "Pfanner." While there is no per se rule that where Applicant incorporates the entirety of Registrant's mark we must find the marks are similar, the fact that Applicant's mark PFANNER STRETCHFLEX incorporates Registrant's entire mark STRETCHFLEX increases the perception the marks are similar. *See e.g., China Healthways Inst. Inc. v. Xiaoming Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007) (applicant's mark CHI PLUS is similar to opposer's mark CHI both for electric massagers); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (applicant's mark VANTAGE TITAN for medical magnetic resonance imaging diagnostic apparatus confusingly similar to TITAN for medical ultrasound diagnostic apparatus); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1366-67 (TTAB 2007) (applicant's mark CLUB PALMS MVP is similar to Registrant's mark MVP); *Broadcasting Network Inc. v. ABS-CBN Int'l*, 84 USPQ2d 1560, 1568 (TTAB 2007) (respondent's mark ABS-CBN is similar to petitioner's mark CBN both for television broadcasting services).

Applicant contends that PFANNER is the dominant part of Applicant's mark because it is the first part of Applicant's mark and because STRETCHFLEX is

suggestive and, therefore, a weak term entitled to only a narrow scope of protection.⁸ First, as analyzed above, the evidence of record fails to show the term STRETCHFLEX is as weak or diluted as Applicant contends.

Second, consumers familiar with Registrant's STRETCHFLEX underwear and loungewear encountering PFANNER STRETCHFLEX protective clothing and sports gear may perceive Applicant's addition of its corporate name merely as the identification of the previously anonymous source of the STRETCHFLEX products. *See In re Chica, Inc.*, 84 USPQ2d 1845, 1848-49 (TTAB 2007) (consumers would view the addition of applicant's corporate name CHICA to the identical wording CORAZON as merely the identification of the previously anonymous source of the goods sold under the mark CORAZON). It has long been held that the addition of a trade name to a registered mark does not generally avoid confusion. *Menendez v. Holt*, 128 U.S. 514, 521 (1888).

We find Applicant's mark PFANNER STRETCHFLEX is similar to the registered mark STRETCHFLEX in appearance, sound, connotation and commercial impression.

III. Similarity or dissimilarity and nature of the goods.

As noted above, Applicant is seeking to register its mark for protective clothing (e.g., accident, radiation and fire protection garments) and protective sporting gear

⁸ Applicant's Brief (7 TTABVUE 10-11).

(e.g., athletic protective shin, knee, back and elbow pads for playing sports) and Registrant registered the cited mark for goods including underwear and loungewear.⁹

To show the goods are related, the Examining Attorney submitted excerpts from third-party websites listed below showing the same mark used to identify the relevant products.¹⁰

⁹ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com; accessed July 30, 2021) defines “loungewear” as “informal clothing usually designed to be worn at home.”

¹⁰ We accord lesser probative value to the evidence from the Stihl website (stihl.com) (December 18, 2018 Office Action (TSDR 63-64)) because Stihl advertises its t-shirts as promotional items (“Perfect to show you are a STIHL fan”) rather than as a core product line. It is common knowledge that many companies across many fields promote their goods and services through the sale or distribution of promotional items such as t-shirts, mugs, hats, etc. The Board, in another case, stated the following, which is equally appropriate in this case:

The licensing of commercial trademarks for use on “collateral” products (such as clothing, glassware, linens, etc.), which are unrelated in nature to those goods or services on which the marks are normally used, has become a common practice in recent years. *See: General Mills Fun Grp., Inc. v. Tuxedo Monopoly, Inc.*, 204 USPQ 396, 400 [TTAB 1979] [where we stated that such use is a matter of common knowledge and “has become a part of everyday life which we cannot ignore”], *affirmed* 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) [where the Court of Customs and Patent Appeals noted that “‘collateral product’ use is a matter of textbook discussion (see J. Gilson, Trademark Protection and Practice §5.05[10] (1980) and frequent commentary (see Grimes and Battersby, The Protection of Merchandising Properties, 69 T.M. Rep. 431 (1979) and references cited therein)”].

In re Phillips-Van Heusen Corporation, 228 USPQ 949, 951 (TTAB 1986). *See also L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1889 (TTAB 2008) (“It is common knowledge, and a fact of which we can take judicial notice, that the licensing of commercial trademarks on ‘collateral products’ has become a part of everyday life.”); *Turner Ent’mt Co. v. Nelson*, 38 USPQ2d 1942, 2945 (TTAB 1996) (“It is common knowledge, and in the present case, undisputed that video games, t-shirts, beach towels, caps and other logo-imprinted products are used as promotional items for a diverse range of goods and services.”).

A. Protective clothing and underwear or loungewear

- Mascot website (mascotworkwear.com) advertising underwear¹¹ and flame retardant clothing¹² and thermal clothing.¹³

- Carhartt website (carhartt.com) advertising flame resistant clothing and accessories,¹⁴ protective gloves,¹⁵ and thermal underwear.¹⁶

B. Protective sporting gear and underwear or loungewear

- Under Armour website (underarmour.com) advertising underwear¹⁷ and golf gloves,¹⁸ baseball batting gloves,¹⁹ and shin guards.²⁰

- Adidas website (adidas.com) advertising underwear,²¹ kneepads,²² and shin guards.²³

¹¹ December 18, 2019 Office Action (TSDR 5-9).

¹² December 18, 2019 Office Action (TSDR 10-13).

¹³ December 18, 2019 Office Action (TSDR 14-18).

¹⁴ December 18, 2018 Office Action (TSDR 69-75).

¹⁵ December 18, 2018 Office Action (TSDR 76-91).

¹⁶ December 18, 2018 Office Action (TSDR 101-104).

¹⁷ December 18, 2019 Office Action (TSDR 23-29).

¹⁸ December 18, 2019 Office Action (TSDR 30-36).

¹⁹ December 18, 2019 Office Action (TSDR 40-43).

²⁰ December 18, 2019 Office Action (TSDR 50-51).

²¹ December 18, 2019 Office Action (TSDR 58-59).

²² December 18, 2019 Office Action (TSDR 60-65).

²³ December 18, 2019 Office Action (TSDR 71-76).

- Nike website (store.nike.com) advertising soccer, running, football, golf, baseball batting, and lacrosse gloves,²⁴ and underwear.²⁵

In determining whether the goods are related, it is not necessary that Applicant's goods and Registrant's goods be identical or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that the Examining Attorney establish that the goods are related in some manner or that conditions and activities surrounding marketing of these goods are such that they would or could be encountered by the same persons under circumstances that could, because of similarities between the marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs.*, 101 USPQ2d at 1722; *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010).

Two examples of entities selling both protective clothing and underwear or loungewear as their core product lines, and three examples of entities selling both protective sporting gear and underwear or loungewear is not sufficient to prove protective clothing and protective sporting gear are related to underwear or loungewear.²⁶

²⁴ December 18, 2018 Office Action (TSDR 138-140).

²⁵ December 18, 2018 Office Action (TSDR 143, 153, and 166).

²⁶ The Examining Attorney did not submit any third-party registrations for goods listed in both the application and registration at issue to prove that the goods are related. Third-party registrations based on use in commerce that individually cover a number of different goods or services may have probative value to the extent that they serve to suggest that the listed goods or services are of a type that may emanate from the same source. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *8 (TTAB 2019); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993). See also Trademark Manual of Examining Procedure

We find the Examining Attorney failed to prove Applicant's protective clothing and protective sporting gear and Registrant's underwear or loungewear are related.

IV. Conclusion

Despite the similarity of the marks, because there is insufficient evidence to prove that Applicant's goods (i.e., protective clothing and protective sporting gear) and Registrant's goods (i.e., underwear and loungewear) are related products, we find Applicant's mark PFANNER STRETCHFLEX for the identified goods in International Classes 9 and 28 is not likely to cause confusion with the registered mark STRETCHFLEX for the identified goods in International Class 25.

Decision: We reverse the refusal to register Applicant's mark PFANNER STRETCHFLEX under Section 2(d) of the Trademark Act.

§ 1207.01(d)(iii) (2021) ("Third-party registrations that cover a number of different goods or services may have some probative value to the extent that they may serve to suggest that goods or services are of a type that may emanate from a single source, if the registrations are based on use in commerce.").